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IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY.
Respondent.

PETITION FOR REHEARING.

EARLE T. FIDDLER,
Attorney for Respondent.

MITCHELL B. CARROLL,
ANDREW KIRKPATRICK,
HERBERT S. McCONNELL,
Of Counsel.



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No. 498

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PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, represented by the undersigned attorney, respectfully applies for a rehearing and modification of the opinion in the case entitled *Rafael Sancho Bonet, Treasurer of Puerto Rico, Petitioner, v. Yabucoa Sugar Company*, No. 498, decided by this Court on March 27, 1939, on the following grounds:

FIRST.

The opinion of the Supreme Court of the United States in this case appears to rest squarely upon the doctrine that decisions of the Courts of Puerto Rico should not be reversed in purely local matters unless clearly wrong.

The Supreme Court of the United States, however, in the last paragraph on page 2 of its opinion in this case, makes the following statement:

“Furthermore four different sections of the 1925 Act (57, 60, 62 and 76 (a)) constitute a statutory plan under which a taxpayer who pays under protest is granted the right to sue in the courts for refund. *Such a taxpayer can sue at law under these sections only if he has been denied refund by both the Treasurer and Board of Review and Equalization of the Island.*” (Italics supplied.)

Your petitioner respectfully calls the attention of the Court to the fact that the last sentence of the above quotation is contrary to the established practice in Puerto Rico and to the express decision of the Supreme Court of Puerto Rico in the *American Colonial Bank of Porto Rico v. Domench*, 43 P. R. R. 853 (decided July 26, 1932).

The *American Colonial Bank* case, supra, involved a suit to recover a deficiency tax assessed by the Treasurer of Puerto Rico pursuant to section 57 of the 1925 Income Tax Act of Puerto Rico. The taxpayer had been notified by the Treasurer of a deficiency, had appealed from such notice to the Board of Review and Equalization under section 57 (a) of the statute and had, after decision by the Board, paid the amount of the deficiency or additional tax under protest. It was argued on behalf of the Treasurer that the taxpayer was required under sections 76 (a) and 76 (b) of the statute, to file a claim for credit or refund with the Treasurer and with the Board on appeal before bringing suit at law to recover the payment. (Sections 57 (a) (b) and (c) and 76 (a) and (b) of the statute are set forth in the Appendix hereto.) The Puerto Rican Supreme Court, however, held:

“We also agree with appellant that if after recourse to the Board of Review and Equalization a taxpayer pays under protest no necessity arises after such payment to recur to said Board. *The intention of the Legislature was to give a right of action after payment under protest.*” (Italics supplied.)

This holding was affirmed by the Supreme Court of Puerto Rico in *Puerto Rico Fertilizer Company v. Domenech*, 50 Decisiones de Puerto Rico, 405 (first decided November 13, 1935 and on July 26, 1936 on reconsideration). The opinions of the Court in the last cited case are set forth in full in Appendix B of respondent's brief already filed with this Court.

In other words, the Supreme Court of Puerto Rico has consistently held that the only steps necessary to the recovery by suit at law of *deficiency taxes* are (a) appeal from the notice of deficiency to the Board of Review and Equalization *before payment*, (b) payment under protest after decision by the Board of Review and Equalization, and (c) filing a suit to recover the amount so paid against the Treasurer within the statutory period after payment. There is not, and never has been, since the decision in the *American Colonial Bank* case, *supra*, a requirement that a claim for credit or refund of deficiency taxes be filed with the Treasurer and on appeal with the Board *after payment* under protest.

In so far as the underlined portion of the opinion of this Court quoted above applies to deficiency taxes, it is not only contrary to the existing decisions of the Supreme Court of Puerto Rico but is immaterial to the decision in the instant case because the recovery of a deficiency tax is not herein involved but rather the recovery of a tax voluntarily paid by the taxpayer. Furthermore, in so far as it applies to such a voluntary overpayment this Court has decided in the instant case that protest is a necessary condition precedent to suit at law and therefore the question of whether or not the filing of a claim for credit and refund with the Treasurer and with the Board on appeal are also necessary conditions precedent to such a suit is immaterial to the decision of this court. If this Court passes on said question its decision would to that extent go beyond the decision of the Supreme Court of Puerto Rico which decided simply that suit at law does not lie to recover any tax unless paid under protest.

Accordingly this Court is hereby respectfully requested to modify its opinion by striking therefrom the sentence appearing on page 3 thereof, as follows:

"Such a taxpayer can sue at law under these sections only if he has been denied refund by both the Treasurer and Board of Review and Equalization of the Island."

SECOND.

The Supreme Court of Puerto Rico in the instant case held merely that payment under protest is a necessary condition precedent to the recovery of any tax in Puerto Rico. Since the opinion of the Supreme Court of the United States is based on the doctrine that the local courts of Puerto Rico will not be reversed in local matters unless clearly wrong, it is assumed that this Court intended to follow the opinion of the Supreme Court of Puerto Rico in the instant case and to hold merely that payment under protest is a necessary condition precedent to suit to recover any tax, leaving the Supreme Court of Puerto Rico free to deal with other points in subsequent cases as they may arise.

However, the portion of the opinion beginning with the fifth line on page 3 goes beyond the existing decisions of the Supreme Court of Puerto Rico in that it implies (last sentence) that no authority, express or implied, is granted by the statute in question to comply with the required condition precedent to the right of suit under section 76 (b). The language in question is as follows:

"And Section 76 (b) which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest expressly prohibits suit in Court 'until a claim for refund or credit has been duly filed with (*the Treasurer and with) the Board of Review and Equalization on *appeal* according to the provisions of law in that regard and the regulations established in pursuance thereof.' (Italics

* NOTE: Inserted by Petitioner to complete the quotation of the statute.

supplied.) Since a voluntary taxpayer is given no express right of appeal from the Treasurer to the Board by the 'provisions of law in . . . regard' to such appeals, he is not expressly authorized to comply with the condition precedent to right of suit under Section 76 (b)." (Italics supplied.)

Neither in this nor any other case has the Supreme Court of Puerto Rico passed directly or indirectly upon the question of whether the taxpayer has a right of appeal to the Board from the Treasurer's decision. The ground for the decision of the Supreme Court of Puerto Rico in the instant case was simply that payment had not been made under protest and that therefore no action could be maintained at law to recover the overpayment (R., 20, 21).

Since the Supreme Court of Puerto Rico has not passed upon the right of the taxpayer to appeal to the Board of Review and Equalization, and since it is believed that the question is not involved in, or necessary to the decision of, the instant case, your Petitioner respectfully requests this Court to modify its opinion so as to remove the inference that the insular Income Tax Act approved in 1925 and the provisions of sections 308 and 310 of the Political Code of Puerto Rico do not authorize an appeal to the Board of Review and Equalization from a denial of a claim for credit or refund by the Treasurer.

THIRD.

The reason for the rule of this Court to the effect that the decisions of the Supreme Court of Puerto Rico on matters of local law will be affirmed unless clearly wrong, requires, Petitioner believes, a corollary rule to the effect that this Court will not pass upon matters of local law not theretofore passed upon by the Supreme Court of Puerto Rico, unless essential to the decision of the case presented to this Court. The Supreme Court of Puerto Rico believes itself bound by the decisions of this Court. This belief found direct expression in *People of Puerto Rico v. Shell*

Co. (P. R.) Ltd. et al., 49 D. P. R. 226, 234 (reversed by this Court, 302 U. S. 253, 82 L. ed. 235), where the insular Court, in commenting upon a contrary decision by the Supreme Court of Oklahoma, said:

"... This would also be our opinion if we did not feel ourselves bound by the decisions of the Supreme Court of the United States. It may be that we are interpreting erroneously the doctrine laid down by the high court, and if so, we would be happy to have been mistaken and to have our error corrected, but so far we have not been convinced that we have erred in such interpretation." (Our translation.)

As we have pointed out, the opinion of this Court in the instant case appears to have reversed settled decisions of the Supreme Court of Puerto Rico on matters of income tax procedure (see point first), and to have passed upon the jurisdiction of the Board of Review and Equalization in matters not heretofore considered by the Supreme Court of Puerto Rico (see point second). We submit that this is contrary to the purpose and intent of the rule that decisions of the Supreme Court of Puerto Rico on matters of local law will be affirmed unless clearly wrong, and to what we believe should be the corollary rule that the Supreme Court of the United States should not pass upon matters of local law not theretofore passed upon by the local courts unless essential to the decision of the Supreme Court of the United States in the case before it.

Petitioner therefore requests this Court to limit its decision to a holding that payment under protest is a necessary condition precedent to suit at law to recover voluntary overpayments of income tax, which was the sole question decided by the Supreme Court of Puerto Rico in the instant case.

Respectfully submitted,

EARLE T. FIDDLER.
Attorney for Petitioner.

San Juan, Puerto Rico,
May 10, 1939.

APPENDIX.

PERTINENT PROVISIONS OF THE PUERTO RICAN INCOME TAX ACT OF 1925.

Section 57—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board shall be assessed, but a proceeding in a district court of competent jurisdiction may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the Treasurer.

Section 76—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a recon-

sideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision.

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

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SUPREME COURT OF THE UNITED STATES.

No. 498.—OCTOBER TERM, 1938.

Rafael Sancho Bonet, Treasurer of Puerto Rico, Petitioner, vs. Yabucoa Sugar Company.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
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[March 27, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

Respondent sued the Treasurer of Porto Rico in a local district court for recovery of 1927 income taxes paid under the laws of the Island. By construction of the local Porto Rican statutes permitting suits for refunds, the local district court found that no right had been granted to sue at law for taxes voluntarily paid. The bill of complaint was then dismissed for lack of jurisdiction, because it disclosed that the tax in question had been paid voluntarily and without protest. The Supreme Court of Porto Rico affirmed, but was reversed by the United States Circuit Court of Appeals.¹

As conceded by respondent, this suit cannot be maintained unless authorized by a Porto Rican law, because Porto Rico cannot be sued without its consent.² It is also conceded that the Porto Rican legislature is not obligated to provide a judicial remedy for tax refunds.³ Respondent's contentions here are that the governing statutes of the Island do authorize the present suit "either by express language or by necessary implication," and that the Porto Rican courts erroneously construed the local statutes.

Section 75 of the controlling Income Tax Act of Porto Rico, approved August 6, 1925,⁴ authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected. . . . and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected," and requires him to "report to The Legislature of Porto Rico at the

¹ 98 Fed. (2d) 398. The opinion of the Supreme Court of Porto Rico, and its opinion on rehearing, have as yet been reported only in Spanish. 50 D. P. R. 962, 51 D. P. R. 135.

² See *Porto Rico v. Rosaly*, 227 U. S. 270, 274; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 262.

³ Cf., *Dismuke v. United States*, 297 U. S. 167, 171, 172.

⁴ *Laws of Porto Rico 1925*, p. 400, 536.

beginning of each regular session . . . all transactions under this section."

The courts of Porto Rico construed Section 75 to mean that the Treasurer's refusal to refund taxes not paid under protest is final, that the local statutes grant the courts no jurisdiction to review this refusal; and that after the Treasurer's report to the legislature a voluntary taxpayer's complaint must be addressed to the legislature. Disagreeing with this construction given the statute by the courts of Porto Rico, the Circuit Court of Appeals (one Judge dissenting) found that the 1925 Act plainly provided a resort to the courts, even in suits to recover taxes voluntarily paid without protest.

It is necessary that we examine some of the considerations which led to the Porto Rican courts' construction of Section 75 of the 1925 Act. For illustration, Section 66 of the Porto Rican Income Tax Law of 1919⁵ imposed upon the Treasurer the duty of making tax refunds (as in Section 75 of the 1925 Act), but Section 66 contained an express provision for "appeal to the courts" if a taxpayer's claim were denied by the Treasurer.⁶ The omission of this express provision from Section 75 and all other Sections of the 1925 Act was logically considered by the Porto Rican courts to be of significance in the construction of that Act. The right of appeal to the courts contained in Section 66 of the 1919 Law was first omitted from the 1921 Porto Rican Law,⁷ and this led the Supreme Court of Porto Rico to declare in the present case that "since 1921, . . . the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated."⁸

Furthermore, four different sections of the 1925 Act (57, 60, 62 and 76(a)) constitute a statutory plan under which a taxpayer who pays under protest is granted the right to sue in the courts for

⁵ Laws, 1919, p. 612, 666.

⁶ Section 66: "That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

⁷ Laws, 1921, p. 312.

⁸ Compania Agricola de Cayey, Ltd. v. Domenec, Treasurer, 47 D. P. R. 535 (Spanish ed.), decided prior to the present case, is to the same effect.

refund. Such a taxpayer can sue at law under these sections only if he has been denied ~~refused~~ by both the Treasurer and the Board of Review and Equalization of the Island. But these sections nowhere expressly authorize appeal from the Treasurer to the Board by one who paid taxes without protest. And Section 76(b), which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest, expressly prohibits suit in court "until a claim for refund or credit has been duly filed with the Board of Review and Equalization *on appeal*, according to the provisions of law in that regard, and the regulations established in pursuance thereof." (Italics supp.) Since a voluntary taxpayer is given no express right of appeal from the Treasurer to the Board by the "provisions of law in . . . regard" to such appeals, he is not expressly authorized to comply with the condition precedent to right of suit under Section 76(b). Rights denied by the statutes could not be granted by regulations.

In addition, Section 76(b) of the 1925 Act is practically identical in language with Section 3226 of United States Revised Statutes governing suits for refunds of United States taxes.⁹ But the legislature of Porto Rico—while apparently using Section 3226 as a model—omitted from 76(b) the clause of Section 3226 reading "suit or proceeding [for tax refund] may be maintained, whether or not such tax . . . has been paid under protest or duress."¹⁰ This substantial adoption of Section 3226, omitting the clause authorizing suit without protest, (as well as the similar omission from the 1921 Act), could hardly represent accidental oversight, but instead indicate a deliberate legislative purpose.¹¹

Congress first granted local authority to the government of Porto Rico in 1900¹² and comprehensively revised the original plan in 1917.¹³ Both enactments manifest a congressional purpose to preserve—consistently with our system of government—the then existing governmental practices. Laws and ordinances then in effect and not contrary to our laws or Constitution were continued in full force, subject to alteration by the Porto Rican legislature or Congress. Original and appellate local courts, their jurisdiction and procedure, were preserved by Congress, and local officials were left in office.¹⁴ And this Court has declared its unwillingness to over-

⁹ 43 Stat. 253, 343.

¹⁰ Cf., United States v. McClure, 305 U. S. —, p. —.

¹¹ Act of April 32, 1900, c. 191, 31 Stat. 77.

¹² Act of March 2, 1917, c. 145, 39 Stat. 951.

¹³ See, Garzot v. de Rubio, 209 U. S. 283, 302.

rule Porto Rican tribunals¹⁴ upon matters of purely local concern¹⁴ or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong,¹⁵ and a disposition to accept the construction placed by a local court upon a local statute¹⁶ and to sustain such a construction in the absence of clear or manifest error.¹⁷

Taxing acts of Porto Rico are purely local and the traditional reluctance of this Court to overturn constructions of such local statutes by local courts is particularly applicable to interpretations of Porto Rican statutes by Porto Rican tribunals.¹⁸ Orderly development of the government of Porto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island.

The judgments of the Porto Rican courts in this case are not unsupported by logic or reason. They embody a recognition of our constitutional division of powers between the legislative and judicial branches of government. Believing the legislature had declined to give the right to sue to a taxpayer who computed his own tax from his own records and voluntarily paid it without protest, the Porto Rican courts properly declined to read implications into a statute which they could not fairly find there. In passing upon a previous construction of a Porto Rican statute by the Supreme Court of Porto Rico, this Court said, "The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong."¹⁹ So here, we cannot say the Porto Rican courts were wrong. In failing to uphold their construction of the local statutes, the Circuit Court of Appeals was in error.

The judgment of the Court of Appeals is ~~reversed~~ and the complaint in the district court of Porto Rico must stand dismissed as ordered by that court and affirmed by the Supreme Court of Porto Rico.

It is so ordered.

¹⁴ *Nadal v. May*, 233 U. S. 447, 454.

¹⁵ *Sante Fe Ry. v. Friday*, 232 U. S. 694, 700.

¹⁶ *Phoenix Ry. Co. v. Landis*, 231 U. S. 578, 579.

¹⁷ *Villanueva v. Villanueva*, 239 U. S. 293, 299; *Waialua Co. v. Christian*, 305 U. S. 91, 109; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 311.

¹⁸ *Diaz v. Gonzalez*, 261 U. S. 102, 105, 106.

¹⁹ *Cardova v. Folgueras*, 227 U. S. 375, 378, 379.

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